The Dismantling of the Griggs Disparate Impact Theory and the Future of Title VII: The Need for a Third Reconstruction

Robert Belton†

I. Introduction

Congress enacted Title VII of the Civil Rights Act of 1964[1] to promote equality in the workplace. Congress clearly intended the Act to remedy intentional discrimination. The Act, however, remains silent about whether it is also concerned with facially neutral employment practices, adopted without a discriminatory motive, that adversely affect the employment opportunities of racial minorities and women.[2] The legislative history of Title VII, as originally enacted, is inconclusive on this issue.

---

† Professor of Law, Vanderbilt Law School

1. Pub. L. No. 88-352, 78 Stat. 241, 253-66 (1964) (codified as amended at 42 U.S.C. § 2000e to 2000e-17 (1982 & Supp. V 1987)). Title VII makes it unlawful for employers, labor unions, and employment agencies to discriminate in employment on the basis of race, color, sex, religion, and national origin.

In addition to Title VII, Congress has enacted a number of other laws prohibiting discrimination in employment. Among these laws are the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1982 & Supp. V 1987); the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1982) (sex-based wage discrimination); the Vocational Rehabilitation Act of 1973, 29 U.S.C. §§ 791, 793-794 (1982) (handicap discrimination); and the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1982) (race discrimination).

For a broad-based discussion on Title VII that includes the views of sociologists, economists, law professors, historians and grass root activists, see conference entitled, *1984: Twenty Years After The 1964 Civil Rights Act: What Needs to Be Done to Achieve the Civil Rights Goals of the 1980's?, reprinted in* 37 RUTGERS L. REV. 665 (1985).

2. While the phrase, "it shall be an unlawful employment practice . . . to discriminate," as used in Title VII, 42 U.S.C. § 2000e-2(a)(1), (2), is deemed to embody our national commitment to equality for racial minorities and women in the workplace, nowhere in the Act is a conception of equality or discrimination defined.

The debate over whether the equal protection clause of the fourteenth amendment supports both the equal treatment and equal achievement theories of equality was resolved in Washington v. Davis, 426 U.S. 229 (1976). The Court held that intentional or purposeful discrimination is required to establish a violation of the equal protection clause, thus limiting the Equal Protection Clause to equal treatment. *Accord* Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979) (a violation of the equal protection clause requires a finding that a public employer made an employment decision "because of" not "merely 'in spite of' its adverse effect upon an identifiable

In 1971, in the landmark case of *Griggs v. Duke Power*,[3] the Supreme Court resolved the issue by holding that Title VII prohibits more than just intentional discrimination (or, disparate treatment). The *Griggs* Court enunciated a second theory of discrimination—"disparate impact"[4]—a results-oriented conception of workplace equality in which race and sex can be taken into account to remedy societal discrimination.[5] Under this theory, employment practices that do not intentionally discriminate but still have an adverse effect on minorities and women can violate Title VII. *Griggs* soon became the focus of an intense national debate about whether a results-oriented conception of workplace equality could (or should) coexist with the color- and sex-blind conception of equality embodied in the disparate treatment theory.[6]

Eighteen years after *Griggs*, the Supreme Court revisited the question and reached an opposite conclusion. In *Wards Cove Packing Co. v. Atonio*,[7] the Court held that the goal of Title VII is to remedy only intentional discrimination.

---

group"). *See generally* Lawrence, *The Id, Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (arguing that the courts have failed to recognize the impact of unconscious racism in the decision making process). The Court applied the same reasoning in holding that employment discrimination claims based on the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1982), need only be subject to the equal treatment test. *See* General Bldg. Contractors Ass'n, Inc. v. Pennsylvania., 458 U.S. 375 (1982).

3. 401 U.S. 424 (1971).

4. The *Griggs* disparate impact theory holds that facially neutral employment practices that have a substantial adverse effect on the employment opportunities of racial minorities and women violate Title VII, unless justified by business necessity.

5. For a discussion of the *Griggs* disparate impact standard, see generally Belton, *Title VII of the Civil Rights Act of 1964: A Decade of Private Enforcement and Judicial Developments*, 20 ST. LOUIS U.L.J. 225, 240-242 (1976); Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59 (1972); Rodino, *Preface* to *Symposium on The First Decade of Title VII of the Civil Rights Act: Past Developments and Future Trends*, 20 ST. LOUIS U.L.J. 222 (1976).

6. The debate over the meaning of "equality" in the workplace is only a part, albeit an important part, of the larger policy debate over our more general commitment to rooting out the past and present effects of societal discrimination against racial minorities and women. *See, e.g.*, D. BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL EQUALITY (1987) (questioning, with the use of parables, this nation's commitment to equality for Blacks); Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118 (1986); Michelman, *The Meanings of Legal Equality*, 3 HARV. BLACKLETTER L.J. 24 (1986) (survey of conceptual meanings of equality); Rosenfeld, *Decoding Richmond: Affirmative Action and The Elusive Meaning of Constitutional Equality*, 87 MICH. L. REV. 1729 (1989); Thomas, *Affirmative Action, Goals and Timetables: Too Tough? Not Tough Enough!*, 5 YALE L. & POL'Y REV. 402 (1987); Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1985). *Compare* Dworkin, *What is Equality? Part 2*, 10 PHIL. & PUB. AFF. 283 (1981) (attempting to prove a substantive notion of equality) *with* Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982) (arguing that equality has no substantive content of its own).

7. 109 S. Ct. 2115 (1989).

Underpinning *Griggs* and *Wards Cove* are two competing visions of workplace equality. One, endorsed by *Griggs*, is the equal achievement theory. The equal achievement theory seeks to enhance the economic status of racial minorities and women in the workplace; this theory permits race- and sex-specific employment practices to eliminate societal discrimination. The other vision, endorsed by *Wards Cove*, is the "equal treatment theory." Under this theory, employers may never consider race or sex in their decisionmaking.[8]

There is a fundamental policy difference between the approach to workplace equality that the Court adopted in *Griggs* and the one it used in *Wards Cove*. *Griggs* construed Title VII as congressional endorsement of both the equal achievement and the equal treatment goals. *Wards Cove*, on the other hand, construed Title VII as congressional endorsement of only the equal treatment goal. Because the Court in *Wards Cove* believed that Title VII could not accommodate both goals, it dismantled *Griggs*'s approach to Title VII. In so doing, it attempted to end the era of affirmative action remedies ushered in by the Court's construction of Title VII in *Griggs*.

The purpose of this article is fourfold. First, it will analyze the *Griggs* approach to workplace equality under Title VII and the inherent tension in its view that Title VII embodies both equal achievement and equal treatment goals. Second, it will review several of the Court's affirmative action decisions to illustrate the tension in the *Griggs* approach. Third, it will analyze the way in which the Supreme Court in *Wards Cove* dismantled the *Griggs* approach to workplace equality. It will conclude with a call for a "Third Reconstruction" to achieve the workplace equality that Congress has now made clear is Title VII's goal.

II. The Indeterminacy of Griggs *on the Meaning of Equality Under Title VII*

Of the more than 100 employment discrimination cases decided by the Supreme Court since the passage of Title VII in 1964, *Griggs v. Duke Power Co.*[9] has been the most important in eliminating employment discrimination. The *Griggs* vision of equality helped create a workplace far more egalitarian than ever existed in the pre-*Griggs*

8. *See* Vuyanich v. Republic Nat'l Bank of Dallas, 505 F. Supp. 224, 262 (N.D. Tex. 1980), *rev'd on other grounds*, 723 F.2d 1195 (5th Cir. 1984); Friedman, *Redefining Equality, Discrimination and Affirmative Action under Title VII, The Access Principle*, 65 TEX. L. REV. 41, 54-57 (1986).

9. 401 U.S. 424 (1971).

era.[10] Nonetheless, by endorsing an equality theory that included two different, and ostensibly conflicting, concepts of Title VII liability—disparate impact and disparate treatment—*Griggs* planted the seeds of its own demise in *Wards Cove*.

Before 1965, Duke Power openly discriminated against Blacks by relegating them to the lowest paying and least desirable jobs. After Congress passed Title VII, Duke Power abandoned intentional discrimination, but the racial stratification of jobs continued because of the criteria the company used in hiring and promoting employees. The company required applicants both to pass two professionally-prepared aptitude tests and to have a high school diploma. Neither criterion was shown to be significantly related to successful job performance. In addition, a higher proportion of Blacks than Whites failed the tests and a higher proportion of Blacks also lacked a high school diploma. As a result, these requirements, although facially neutral, substantially limited black employment opportunities.

The critical issue in *Griggs* was whether Duke Power had violated Title VII because the effects of these policies limited employment opportunities of Blacks even though it had not adopted those practices with the intent of discriminating against Blacks.[11] The lower courts had held that Title VII liability required a subjective intent to discriminate.[12]

A unanimous Supreme Court, however, rejected this position.[13] Looking to the objective of Congress, the Court held that Title VII "proscribes not only overt discrimination but also practices that are

10. *See* Blumrosen, *The Legacy of Griggs: Social progress and Subjective Judgements*, 63 CHI. KENT L. REV. 1, 3-7 (1987); Greene, *Twenty Years of Civil Rights: How Firm A Foundation?*, 37 RUTGERS L. REV. 707, 719-730 (1985). *See generally* P. BURSTEIN, DISCRIMINATION, JOBS, AND POLITICS, 125-154 (1985) (social science analysis of the impact of employment discrimination legislation on various groups).

11. The Supreme Court specifically noted that Duke Power was not motivated by racial discrimination in adopting the aptitude test and diploma requirements. Chief Justice Burger noted, "The Company's lack of discriminatory intent is suggested by special efforts to help the undereducated employees through Company financing of two-thirds the cost of tuition for high school training." 401 U.S. at 432.

12. 292 F. Supp. 243, 251 (M.D.N.C. 1968), *aff'd in part, rev'd in part*, 420 F.2d 1225 (4th Cir. 1970), *rev'd in part*, 401 U.S. 424 (1971).

13. In so doing, *Griggs* followed those lower courts that had liberally construed Title VII. This liberal interpretation was most manifest in seniority and testing cases, in which courts had principally applied the theory of "the present effects of past discrimination". Establishing a violation of Title VII under this theory required a finding that the employer at some time had engaged in intentional discrimination that caused the present racial or sexual stratification of its workforce. *See e.g.*, Papermakers & Paperworkers Local 189 v. United States, 416 F.2d 980 (5th Cir.1969), *cert. denied*, 397 U.S. 919 (1970); Quarles v. Philip Morris, 279 F. Supp. 505 (E.D. Va. 1968). *See generally* Cooper & Sobel, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598 (1969).

fair in form, but discriminatory in operation."[14] The Court further reasoned that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups"[15] because "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation."[16]

To address these "consequences" or effects, the *Griggs* Court adopted the disparate impact theory. According to this theory, a plaintiff can establish Title VII liability against an employer by proving that an employment practice, procedure, or test that is facially neutral in fact disproportionately limits the employment opportunities of one group.[17] The theory also permits, in appropriate circumstances, race- and sex-specific remedial measures to eliminate the unequal effects of facially-neutral employment criteria.[18]

By articulating the effects-based disparate impact theory of discrimination, *Griggs* embraced the equal achievement theory of equality. As the Court explained, "The objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[19]

Griggs recognized that such "barriers" would not disappear simply by prohibiting intentional discrimination. Race and gender stratification would continue as remnants of prior group discrimination in the workplace and of the past and continuing effects of societal discrimination. As a later case explained: "*Griggs* was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work cumulative and invidious burden on such citizens

14. 401 U.S. at 431.
15. *Id.* at 432.
16. *Id.* at 432.
17. *Id.* at 431. The *Griggs* disparate impact theory, in effect, delinked the intent and effects elements, both of which "the present effects of past discrimination" theory required to establish a Title VII violation. *See supra* note 13. After *Griggs*, a finding that a practice disproportionately limited the employment opportunities of racial minorities and women was sufficient to establish a Title VII violation, provided the employer could not justify the practice as a business necessity.
18. *See, e.g.*, Ellis, *Victim-Specific Remedies: A Myopic Approach to Discrimination*, 13 N.Y.U. REV. L. & SOC. CHANGE 575 (1984-85); Jones, *The Bugaboo of Employment Quotas*, 1970 WISC. L. REV. 341; Schnapper, *Varieties of Numerical Remedies*, 39 STAN. L. REV. 851 (1987).
19. 401 U.S. at 429-30.

for the remainder of their lives."[20] To counteract the impact of societal discrimination on the workforce, *Griggs* proscribed any practice, procedure or test if it "operate[d] to 'freeze' the status quo of prior discriminatory employment practices."[21]

Although *Griggs* focused on articulating the disparate impact theory, it also implicitly recognized the continued existence of a second strand of Title VII liability, disparate treatment. Unlike the disparate impact theory, disparate treatment requires a finding of intentional discrimination—the plaintiff must prove that an employer intentionally treated her differently because of race or sex.[22] While the Supreme Court did not develop the doctrinal foundations for disparate treatment until after *Griggs*,[23] the *Griggs* Court did hold that the lower courts had not erred in adopting an analytic approach to Title VII that focused on whether the company's test and diploma requirements had intentionally discriminated against Blacks.[24]

The *Griggs* Court's decision to leave intact the lower courts' disparate treatment approach to workplace equality demonstrates its willingness to apply a disparate treatment standard when employers intentionally discriminated against minorities and women. Nonetheless, the Court created the disparate impact standard to cover those situations in which all employees—minorities, nonminorities, and women—were evaluated by the same facially neutral criteria, but where the effects of a practice systematically disadvantaged minorities and women. For this situation, the Court, in effect, legitimized color- and sex-specific remedies to correct the adverse effects of the practice.

Endorsing both theories of discrimination, however, created a theoretical and practical tension. While an equal achievement theory of equality underlies disparate impact, a contradictory view of equality underlies disparate treatment—equal treatment. These two theories of equality and their doctrinal manifestations necessarily

20. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 806 (1973). The reference to "forces beyond" the control of racial minorities can only mean societal discrimination.

21. 401 U.S. at 430.

22. *See e.g.*, McDonnell Douglas, 411 U.S. 792, 802-4; Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (noting the substantive difference between the two theories).

23. *See* McDonnell Douglas, 411 U.S. 792; Burdine, 450 U.S. 248. The Court clearly stated that Title VII provides a remedy for both disparate impact and disparate treatment discrimination in *Teamsters*, 431 U.S. at 335 n.15.

24. 401 U.S. at 432.

conflict because they have different objectives. The equal treatment/disparate treatment model is *process* oriented; it aims to eliminate race and sex from the employer's decision making process, and thus to establish strict race and sex neutrality.[25] Conversely, the equal achievement/disparate impact model is *results* oriented; it seeks to improve the economic position of minorities and women by redistributing more desirable jobs to them. This requires employers to consider race and sex in their decisions. In addition, while equal treatment paradigmatically focuses on individuals, equal achievement focuses on groups—in particular their economic and social status—and legitimates group-based relief.[26] The tension between these two theories is inevitable because civil rights laws cannot as a matter of policy—and employers cannot as a matter of practice—simultaneously ignore and consider race and sex.

This tension was inherent in the reasoning of *Griggs* but went unrecognized by the Court. Only once did the Court seem to acknowledge it when it wrote:

> Congress did not intend by Title VII . . . to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.[27]

By proscribing "discriminatory preferences for any group, minority or majority," the Court seemingly reneged on the equal achievement theory's emphasis on race- and sex-specific remedies for

25. The rationale the Court used in Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978), is illustrative of the equal treatment theory. The employer in *Manhart* had adopted a policy under which female employees were required to make larger contributions to a pension fund than male employees, even though, upon retirement, similarly-situated females and males received the same amount in the retirement payout. The employer justified the policy on the ground that women, as a group, live longer than men, as a group. In holding that the policy violated Title VII, the Court reasoned that Title VII "precludes treatment of individuals as simply components of a racial, religious, sexual, or national class. . . . Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply." *Id.* at 708.

The meritocracy principle rather than race or sex, is the goal of the equal treatment theory. For a discussion of the merit principle within the context of the equality debate, *see* Fallon, *To Each According to his Ability, From None According to his Race: The Concept of Merit in the Law of Antidiscrimination*, 60 B.U.L. REV. 815 (1980).

26. For a comprehensive treatment of the differences and tensions between the two theories, see Caldwell, *Reaffirming the Disproportionate Effects Standard of Liability in Title VII Litigation*, 46 U. PITT. L. REV. 555 (1985); Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235 (1971); Friedman, *supra* note 8; Chamallas, *Evolving Conceptions of Equality Under Title VII: Disparate Impact Theory and the Demise of the Bottom Line Principle*, 31 UCLA L. REV. 305, 365 (1983).

27. 401 U.S. at 430-31.

groups that had been victimized by societal discrimination. Instead, it appeared to endorse the vision of workplace equality of the equal treatment theory. The *Griggs* Court, however, did not resolve this contradiction between results- and process-oriented policies.

Griggs triggered a national debate over whether Title VII was founded only on disparate treatment theory or whether it also embraced the disparate impact theory.[28] If the two theories were irreconcilable because one endorsed race and sex neutrality and the other endorsed race and sex consciousness, then the Court should have decided which of the two theories of discrimination was, in fact, the objective of Title VII. If disparate impact and disparate treatment were alternative approaches to the goals of equality, the Court should have specified whether they could apply to the same fact pattern. If they could not, the issue still remained as to the circumstances under which each applied. Answering these questions was critical to resolving the tension in *Griggs*.

The Court, however, sent out mixed signals on these important issues. For example, in *McDonnell Douglas Corp. v. Green*,[29] the seminal case in which the Court began to develop an analytic scheme for evaluating disparate treatment claims, the Court strongly suggested that the two theories were not alternative ways to evaluate a claim of discrimination under Title VII. While the Court of Appeals had applied the *Griggs* disparate impact theory to establish liability,[30] the Supreme Court rejected the application of the disparate impact theory to the facts at hand. The sole issue, it held, was whether the employer intentionally discriminated against the individual plaintiff.[31]

In a 1977 case, *Teamsters v. United States*, however, the Court explicitly stated that either theory may be applied to a particular set of facts.[32] But one year later, in *Furnco Construction Corp. v. Waters*,[33] the Court changed course again. The *Furnco* plaintiffs had sought relief under both Title VII theories. The Court, however, analyzed the

28. *See, e.g.*, Gold, *Griggs' Folly: An Essay on the Theory, Problems and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 INDUS. REL. L.J. 429 (1985)(arguing that the impact theory is not supported by legislative history of Title VII and should be discarded); Belton, *Discrimination and Affirmative Action: An Analysis of Competing Theories of Equality and Weber*, 59 N.C.L. REV. 531 (1981)(arguing in support of the *Griggs* disparate impact theory); Blumrosen, *Griggs Was Correctly Decided—A Response to Gold*, 8 INDUS. REL. L.J. 433 (1986).

29. 411 U.S. 792 (1973).

30. *Id.* at 805-06.

31. *Id.* at 806.

32. 431 U.S. 324, 335 n.15 (1977).

33. 438 U.S. 567 (1978).

claim under only the disparate treatment theory, without addressing the disparate impact claim. Writing for the majority, (now Chief Justice) Rehnquist strongly endorsed the view that the two theories were not alternative analytic schemes, but that necessarily a choice had to be made in any given case.[34] Justice Marshall issued a separate concurrence specifically to disagree with Justice Rehnquist's assumption that the plaintiffs were foreclosed, on remand, from seeking relief under the disparate impact theory.[35] The mixed signals from these cases and the Court's persistent failure to provide clear guidelines had a predictable result—continued conflict in the lower courts on this issue. This conflict would continue to 1988, eventually setting the stage for *Wards Cove*.

III. The Manifestation of the Indeterminate Legacy of Griggs *in Affirmative Action Cases*

The *Griggs* disparate impact theory provided both the practical and doctrinal foundations for race- and sex-specific affirmative action plans. The issue of the legality of affirmative action plans in turn reignited the debate over the meaning of equality in the workplace and the two Title VII theories of discrimination endorsed in *Griggs*.[36]

The Court developed different analytic schemes for the two theories based on causation,[37] presumption, and burden-shifting doctrines.[38] Disparate impact claims require plaintiffs first to establish a prima facie case of discrimination, which establishes a legal presumption that the challenged practice violates Title VII. A prima facie case is most often established through statistical evidence showing that a challenged policy or practice adversely affects the

34. *Id.* at 575 & n.7.

35. *Id.* at 584-85 (Marshall, J., concurring in part, dissenting in part).

36. The vision of equality embraced in the Constitution and the legality of affirmative action plans under the Constitution raised problems and issues similar to and different from those posed in Title VII cases. The Court attempted to resolve the debate over the Constitution's vision of equality in City of Richmond v. J. A. Croson, 109 S. Ct. 706 (1989). Title VII, however, is the focus of this article. For a discussion of how successful Croson was in addressing the constitutional vision of equality, *see,* Rosenfeld, *supra* note 6.

37. *See* Belton, *Causation in Employment Discrimination Law*, 34 WAYNE L. REV. 1235 (1988)(discussing the causal element in Title VII cases).

38. *See* Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205 (1981)(discussing the conflict over burden-shifting rules in Title VII cases).

employment opportunities of a racial minority group or of women.[39] If the plaintiffs established a prima facie case, the employer could avoid Title VII liability by proving that business necessity mandated the practice and that no alternative practices would be consistent with its business operation without the same adverse effect on racial minorities and women.[40]

Two of the most critical determinations that had to be made in the disparate impact cases were the proper use of statistical evidence in proving a prima facie case and the evidentiary showing required to make out the business necessity defense. Prior to its 1987 and 1988 Terms, the Court devoted much judicial energy to the issue of statistical evidence.[41] It had not, however, provided sufficient guidelines on the evidentiary showing required for the business necessity defense.[42] It was generally agreed that a validation study provided the most probative evidence of business necessity.[43] Validation, however, was commonly known to be difficult, costly, and time-consuming.[44]

Accordingly, many employers sought alternative ways to reduce the likelihood of a disparate impact suit. Primarily, they adopted affirmative action plans, pursuant to which they expressly took race or sex into account in hiring or promoting in order to substantially

39. The Court first sanctioned the use of statistical evidence in Title VII cases in Teamsters v. United States, 431 U.S. 324 (1977), and Hazelwood v. United States, 433 U.S. 299 (1977).

40. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

41. *See e.g.*, Bazemore v. Friday, 478 U.S. 385 (1986); Connecticut v. Teal, 457 U.S. 440 (1982); Hazelwood v. United States, 433 U.S. 299 (1977); Dothard v. Rawlinson, 433 U.S. 321 (1977); Teamsters v. United States, 431 U.S. 324 (1977). *See* Shoben, *Probing the Discriminatory Effect of Employee Selection Procedures with Disparate Impact Analysis Under Title VII*, 56 TEX. L. REV. 1 (1977).

42. *See*, Contreras v. City of Los Angeles, 656 F.2d 1276 (9th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982) (courts split over business necessity defense because of no guidance from the Supreme Court); Note, *Business Necessity: Judicial Dualism and the Search for Adequate Standards*, 15 GA. L. REV. 376 (1981); Comment, *The Business Necessity Defense to Disparate Impact Analysis Liability Under Title VII*, 46 U. CHI. L. REV. 911 (1979); Note, *Business Necessity Under Title VII of the Civil Rights Act of 1964: A No—Alternative Approach*, 84 YALE L.J. 98 (1974).

43. *See, e.g., Albemarle Paper Co.*, 422 U.S. 405; In 1978, the four principal federal agencies responsible for the federal law prohibiting discrimination in employment jointly adopted the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 (1979). The Guidelines set out various methodologies for validating employee selection criteria.

44. *See* Watson v. Fort Worth Bank and Trust, 108 S. Ct. 2777, 2787 (1988) ("validating subjective selective criteria . . . is impracticable"). It has been estimated that an employer seeking to validate a single employee characteristic such as an arithmetic test for mechanics could expect to incur validation costs ranging from $20,000 to $100,000. Gwartney, Asher, Haworth & Haworth, *Statistics, the Law and Title VII: An Economist's View*, 54 NOTRE DAME L. REV., 633, 643 (1979).

reduce racial and sexual disparities in their workforce.[45] By reducing these disparities, it became more difficult for plaintiffs to use statistical evidence to establish a prima facie case of disparate impact discrimination.[46] If a prima facie case of disparate impact discrimination could not be shown, an employer would not be required to justify a challenged employment practice as a business necessity.

The Court first addressed the legality of affirmative action plans under Title VII in *Steelworkers v. Weber*.[47] In *Weber*, a group of white employees challenged an affirmative action plan the employer and its union had jointly adopted in part to limit exposure to disparate impact liability.[48] The white employees claimed to be victims of disparate treatment discrimination because the union and employer's policy considered race in making selection decisions. To support their claim, the plaintiffs relied upon Section 703(j) of the Civil Rights Act of 1964, which, in pertinent part, provides that nothing in Title VII "shall be interpreted to require any employer . . . to grant preferential treatment to any group because of race, color, religion, sex, or national origin" because of an imbalance between members of these groups in the employer's workforce and the relevant labor market from which the employer draws its applicants and employees.[49]

---

45. Note, *Rethinking Weber: The Business Response to Affirmative Action*, 102 HARV. L. REV. 658 (1989). Another avenue that employers pursued to avoid facing the business necessity defense was to seek the assistance of the EEOC. The EEOC responded to the employers' request by endorsing the "bottom line" defense. The Supreme Court rejected the "bottom line" defense in Connecticut v. Teal, 457 U.S. 440 (1982). *See infra* text accompanying notes 59-73.

46. *See* Steelworkers v. Weber, 443 U.S. 193, 211 (1979)(Blackmun, J., concurring)("to the extent that Title VII liability is predicated on the 'disparate effect' of an employer's past hiring practices, [a valid affirmative action] program makes it less likely that such an effect could be demonstrated").

47. 443 U.S. 193 (1979).

48. *Id.* at 210 (Blackmun, J., concurring).

49. 42 U.S.C. § 2000e-2(j), Section 703(j), provides in pertinent part:

> Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by an employer . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

In a 6-3 decision, the *Weber* Court upheld the affirmative action plan.[50] Justice Brennan, writing for the majority, relied on a construction of Title VII that supported the disparate impact theory and its underlying goal of remedying the effects of societal discrimination. He wrote:

> The [Title VII] prohibition against racial discrimination . . . must therefore be read against the background of the legislative history . . . and the historical context from which the Act arose. . . .[51] Congress' primary concern in enacting the prohibition against racial discrimination in Title VII . . . was with 'the plight of the Negro in our economy.'[52]
>
> * * *
>
> . . . . It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had 'been excluded from the American dream for so long' . . . constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.[53]

Justice Blackmun's separate concurrence addressed the practical quandaries that employers faced:

> The broad prohibition against discrimination places the employer and the union on . . . a 'high tightrope without a net beneath them'. . . . If Title VII is read literally, on the one hand they face liability for past discrimination against blacks, and on the other they face liability to whites for any voluntary preferences adopted to mitigate the effects of prior discrimination against blacks.[54]

To mitigate this problem and to reduce the tension between the two Title VII theories of discrimination, Justice Blackmun adopted an "arguable violation" test for determining the legality of affirmative action plans under Title VII.[55] The "arguable violation" approach would legitimize only voluntary affirmative action plans that responded to probable past or continuing effects of discrimination in the workforce or in society.

---

50. The Court framed the question as "whether Congress, in Title VII . . . left employers and unions in the private sector free to take . . . race-conscious steps to eliminate racial imbalances in traditionally segregated job categories." 443 U.S. at 197.

51. *Id.* at 201.

52. *Id.* at 202 (citation omitted).

53. *Id.* at 204 (citation omitted).

54. *Id.* at 209-10 (Blackmun, J., concurring) (citation omitted).

55. *Id.* at 209-217. The "arguable violation" test had been espoused by Judge Wisdom who had dissented in the court of appeals decision.

The dissent appropriated Blackmun's insights on the tension between the race-neutral language of Title VII[56] and the disparate impact theory to reject such affirmative action plans. Justice Rehnquist and Chief Justice Burger construed the language of both Title VII and *Griggs* as embracing only the equal treatment theory of equality, and as incompatible with the race-conscious, results-oriented affirmative action plans. Justice Rehnquist wrote that "[t]he operative sections of Title VII prohibit . . . discrimination in employment *simpliciter*. . . . [It] prohibits a covered employer from considering race when making an employment decision, whether the race be black or white."[57] With respect to *Griggs*, he wrote that:

> We have never wavered in our understanding that Title VII 'prohibits *all* racial discrimination in employment, without exception for any group of particular employees.' In *Griggs v. Duke Power Co.*, our first occasion to interpret Title VII, a unanimous Court observed that '[d]iscriminatory preference, for any group, minority or majority, is precisely and only what Congress has proscribed.'[58]

Weber produced one alignment of justices on the question of whether Title VII's primary goal was fair processes for individuals or equitable results for groups. The Brennan majority emphasized equitable results; the Rehnquist minority was concerned simply with fair treatment. In the later case of *Connecticut v. Teal*,[59] however, the camps switched positions. *Teal* addressed the legality of the "bottom line" defense. The employer, in *Teal*, used a two-step selection process. The first step involved an objective standard—a written examination; the second step involved subjective standards—past performance, supervisors' recommendation and, in some instances, seniority.[60] Black employees who failed the test sued the employer under the disparate impact theory.[61] The employer defended with the "bottom line" defense, which holds that for a multi-criteria selection process, if the employer can demonstrate that the entire selection process does not produce disparate results, the employer is

56. *See* Title VII, Sections 703(a)(1) and (a)(2), 42 U.S.C. §§ 2000e-2(a)(1), (2).
57. *Weber*, 443 U.S. at 220 (Rehnquist, J., dissenting).
58. *Id.* at 220-21.
59. 457 U.S. 440 (1982) (citation omitted).
60. 457 U.S. at 443-444.
61. Slightly more than 54% of the black candidates, compared to more than 79% of the white candidates, passed the written examination. *Id.* at 443, n.4. In the second step of the promotion process, 22.9% of black candidates were promoted, as compared to 13.5% of the white candidates. *Id.* at 444.

not liable under Title VII, even if one of the selection criteria has a disparate impact.[62]

In a 5-4 decision, again authored by Justice Brennan,[63] the Supreme Court held that the "bottom line" was neither a defense to a disparate impact claim nor a rebuttal to a prima facie case of disparate impact.[64] Although the majority applied the *Griggs* disparate impact analysis, it based its reasoning in substantial part on the Court's prior disparate treatment cases.[65] Justice Brennan argued that an employer may not discriminate against some employees on the basis of race merely because the employer treats other members of the employees' group in a favorable manner.[66] The reason, he explained, was that Section 703(a)(2) of Title VII — the same provision the Court relied on to establish the disparate impact theory in *Griggs*[67]—principally protects the individual employee, not the minority group as a whole.[68] Brennan's emphasis on the employment opportunities of individual employees parallels Rehnquist's rationale in his dissent in *Weber* for rejecting affirmative action plans.

In his *Teal* dissent, Justice Powell[69] advocated upholding the "bottom line" defense. He asserted that by relying on disparate treatment rationale in a disparate impact case, the majority would conflate the two Title VII theories and confuse employment discrimination litigation.[70] Powell further argued that the majority's analysis might force employers either to abandon employment testing or to rely exclusively on expensive validation procedures, which may or may not be upheld under the business necessity defense.[71] The objective of the disparate impact theory, Powell reiterated, was

62. The "bottom line" theory was established by federal agencies that have the major responsibility for administratively enforcing laws prohibiting discrimination. For the developments leading to the adoption of the defense, see generally Blumrosen, *The Bottom Line in Equal Employment Guidelines: Administering a Polycentric Problem*, 33 ADMIN. L. REV. 323 (1981).

63. Justice Brennan was joined by Justices White, Marshall, Blackmun, and Stevens.

64. *Teal*, 457 U.S. at 442.

65. Three of the cases that the majority heavily relied upon— Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978); Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978), and Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971)—were disparate treatment cases.

66. *Teal*, 457 U.S. at 455.

67. *Id.* at 440-49 (a disparate impact claim reflects the language of section 703(a)(2) and Congress's basic objective in enacting Title VII).

68. Brennan stated, "The principle focus of [section 703(a)(2)] is the protection of the individual employee, rather than the protection of the minority group as a whole." *Id.* at 453-54.

69. Justice Powell, who did not participate in *Weber*, was joined in *Teal* by Chief Justice Burger and Justices Rehnquist and O'Connor.

70. *Teal*, 457 U.S. at 459.

71. *Id.* at 463.

to remedy employment discrimination against groups, rather than individuals.[72]

IV. Wards Cove's *Dismantling of* Griggs *and the Endorsement of A Single Theory of Equality*

In 1988, the Supreme Court decided *Wards Cove Packing Co. v. Atonio*[73] and sought to resolve the debate over which theory of workforce equality Title VII embraces. Although *Wards Cove* did not expressly overrule the *Griggs* disparate impact theory, it established doctrinal rules regarding statistical evidence, the business necessity defense, causation, and burden-shifting rules, that left little doubt that it intended to dismantle *Griggs*.

A. Watson v. Fort Worth Bank and Trust: *The Precursor of the Dismantling of* Griggs.

Wards Cove's doctrinal roots stretch to *Watson v. Fort Worth Bank and Trust*,[74] a case the Court decided the previous Term. In *Watson*, the Court granted certiorari to consider whether the disparate impact theory applies to subjective criteria. The *Watson* plaintiff, a black woman, alleged that she had been denied a promotion because of her race. Supervisors relied on subjective criteria to award the position to a white woman instead.[75] A unanimous Court held that the disparate impact theory applies to subjective as well as objective selection criteria.[76] To hold otherwise, the Court implied, would nullify *Griggs* and its progeny, and encourage employers to rely exclusively on subjective criteria in order to insulate their employment practices from the more rigorous scrutiny imposed by the business necessity requirement.[77]

This implication, however, is misleading. The plurality, in an opinion written by Justice O'Connor, clearly intended to take "a fresh and somewhat closer examination of the constraints that operate to keep [the Court's holding in *Watson*] within its proper bounds."[78] The plurality undertook this reassessment to address the

72. *Id.* at 458-59.
73. 109 S. Ct. 2115 (1989).
74. 108 S. Ct. 2777 (1988).
75. Apparently included in the factors that the supervisors used to make the decision were ability to use common sense and to exercise good judgment, originality, ambition, loyalty and tact. *See id.* at 2787.
76. *Id.* at 2787.
77. *Id.*
78. *Id.* at 2788 (plurality opinion). Justice O'Connor was joined by Chief Justice Rehnquist and Justices White and Scalia.

employer's argument that it would now have to adopt affirmative action plans in order to avoid liability under the *Griggs* disparate impact theory:[79]

> Respondent contends that a plaintiff may establish a prima facie case of disparate impact through the use of bare statistics, and that the defendant can rebut this statistical showing only by justifying the challenged practice in terms of 'business necessity,' . . . or 'job relatedness' . . . . Respondent warns, however, that 'validating' subjective selection criteria in this way is impracticable. . . . Because of these difficulties, we are told, employers will find it impossible to eliminate subjective criteria and impossibly expensive to defend such practices in litigation. Respondent insists, and the United States agrees, that employers' only alternative will be to adopt surreptitious quota systems in order to ensure that no plaintiff can establish a statistical prima facie case.[80]

Although the employer's argument was limited to subjective criteria, it more broadly and directly attacked the *Griggs* disparate impact theory and its doctrinal foundation for affirmative action. The employer argued, in effect, that Title VII endorses only the disparate treatment theory.[81]

Finding great force in the employer's arguments,[82] the *Watson* plurality proceeded to rewrite the law on disparate impact analysis by stripping it of its doctrinal underpinnings. First, the plurality held that standing alone, bare statistical evidence of disparate impact could no longer establish a prima facie case of disparate impact discrimination. Now a plaintiff must isolate and identify the *specific*

---

79. *Id.* at 2786.

80. *Id.* at 2787 (citations omitted).

81. Similarly the Reagan administration espoused the argument that Title VII embraces only the equal treatment/disparate treatment theory of equality. In fact, President Reagan and his administration came to office committed to a policy of color- and sex-blindness and so fundamentally opposed the *Griggs* disparate impact theory of equality. The Reagan Administration's position on the theory of equality has been explored and debated extensively in the literature. *See*, Reynolds, *The Reagan Administration and Civil Rights: Winning the War Against Discrimination*, 1986 U. ILL. L. REV. 1001; Reynolds, *Individualism vs. Group Rights: The Legacy of Brown*, 93 YALE L.J. 995 (1984); Reynolds, *Justice Department Policies on Equal Employment and Affirmative Action*, 35 N.Y.U. CONF. ON LAB. 443 (1983). For other commentary on the Reagan Administration's position on civil rights, see Bartholet, *The Radical Nature of the Reagan Administration's Assault on Affirmative Action*, 3 HARV. BLACKLETTER L.J. 37 (1986); Days, *Turning Back the Clock: The Reagan Administration and Civil Rights*, 19 HARV. C.R.-C.L. L. REV. 309 (1984); Selig, *The Reagan Justice Department and Civil Rights: Professor Selig Responds to Assistant Attorney General Reynolds*, 1987 U. ILL. L. REV. 431.

82. Watson v. Fort Worth Bank & Trust, 108 S. Ct. 2777, 2787 (1988) (plurality opinion).

employment practices that allegedly create the statistical disparities.[83] Second, a plaintiff must establish a causal relationship between these specific practices and the alleged harmful impact.[84] Furthermore, the Court substantially lowered the defendant's evidentiary burden.[85] Finally, the Court departed from *Griggs* in suggesting that "[f]actors such as the cost or other burdens of proposed alternative selection devices" are relevant to a defense of business necessity.[86]

The plurality's revision of the *Griggs* evidentiary and burden-shifting rules was driven by its view that Title VII embraced only the equal treatment/disparate treatment model of discrimination.[87] Under this view, any rule or doctrine that encourages preferential treatment based on race or sex compromises equality.[88] The plurality based its decision on section 703(j)—the same section on which the white plaintiffs in *Weber* relied; the plurality construed this section as Congress's clear and unambiguous statement that Title VII supports only the equal treatment theory of equality.[89]

However, the *Watson* plurality's construction ignored the Court's interpretation of Section 703(j) more than a decade earlier. In *Teamsters v. United States*,[90] the Court rejected an employer's argument that Section 703(j)'s reference to preferential treatment precluded a group-based analysis based on statistical evidence. *Teamsters* held that statistical evidence showing gross racial or gender disparities in the employer's workforce was significant because it

83. *Id.* at 2788.

84. *Id.* at 2788-89.

85. *Id.* at 2790 ("Although we have said [in *Griggs*] that an employer has the 'burden of showing that any given requirement must have a manifest relationship to the employment in question,' . . . such a formulation should not be interpreted as implying that the ultimate burden of proof can be shifted to the defendant.").

86. *Id.* at 2790. *But see* Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702, 717 (1978)(specifically noting that Congress had rejected cost as a defense to a claim of discrimination under Title VII). For a critical assessment of the *Watson* guidelines, *see* Mertens, *Watson v. Fort Worth Bank and Trust: Unanswered Questions*, 14 EMPLOYEE REL. L.J. 163 (1988).

87. *Id.* at 2791 ("high standards of proof in disparate impact cases are sufficient in our view to avoid giving employers incentives to modify any normal and legitimate practices by introducing quotas or preferential treatment").

88. 108 S. Ct. at 2778 ("Preferential treatment and use of quotas by public employers subject to Title VII can violate the Constitution, . . . and it has long been recognized that legal rules leaving any class of employers with 'little choice' but to adopt such measures would be 'far from the intent of Title VII.' ")(citations omitted).

89. *Id.* ("Congress has clearly and emphatically declared that the enactment of Title VII is not to be construed to give employers an incentive to engage in preferential treatment on the basis of race or sex").

90. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

was often a telltale sign of purposeful discrimination.[91] Although *Teamsters* was a class action disparate treatment case, the reasoning of the Court was aligned with the group-oriented, equal achievement vision of *Griggs*. The *Watson* plurality, ignoring this precedent, began to dismantle the *Griggs/Teamsters* model and replace it with the individualized equal treatment/disparate treatment scheme.

B. Wards Cove: Griggs *Disparate Impact Theory Dismantled.*

The efforts to dismantle *Griggs* culminated in *Wards Cove*. Plaintiffs in *Wards Cove*, a group of Samoans, Chinese, Filipinos, Japanese, and Alaskan Natives,[92] brought a Title VII disparate impact claim against an Alaskan salmon cannery. They challenged a range of objective and subjective employment criteria.[93] The Court granted certiorari in *Wards Cove* to resolve some of the issues concerning the proper application of the disparate impact theory that the Court had been unable to resolve in *Watson*.[94] A five-justice majority, with Justice Kennedy now participating, did what the Court had been unable to do the previous year in *Watson*: it dismantled the *Griggs* disparate impact theory by adopting the plurality's position in *Watson* and clarifying its underlying vision of workplace equality under Title VII.

The *Wards Cove* Court, elaborating on the *Watson* plurality, greatly increased the employee's burden to establish a prima facie case of disparate impact and greatly reduced the employer's burden to defend its practices. The Court agreed with *Watson* that in order to establish a prima facie case, the plaintiff must now isolate and prove which specific employment practices caused the statistical disparity.[95] The Court further held that plaintiff's showing of disparity at the "bottom line" was insufficient to establish a prima facie case.[96]

If the plaintiff carries its prima facie burden, the Court agreed with *Watson* that the employer can rebut the plaintiff's case without

---

91. *Id.* at 339 n.20.

92. 109 S. Ct. at 2127 n.4 (Stevens, J., dissenting).

93. Justice Stevens described the circumstances at the employer's business as "bear[ing] an unsettling resemblance to aspects of a plantation economy[,]" by noting the segregated housing and dining facilities, and the racial and ethnic stratification of jobs. *Id.* at 2127 n.4.

94. *Id.* at 2121. The difference in the composition of the Court at the time it decided *Wards Cove* and its earlier decision in *Watson* was the presence of Justice Kennedy, who had not participated in *Watson*.

95. *Id.* at 2124.

96. *Id.* at 2124-25. Apparently the Court thought it only fair to apply the same rule on "bottom line" statistics to a plaintiff, as it has adopted for defendants in Connecticut v. Teal, 457 U.S. 440 (1982).

proving that the practice was mandated by business necessity. Instead, the employer only has to provide a "legitimate business justification" for the practice.[97] In addition, cost saving could now be a relevant consideration.[98] Finally, the Court imposed on the employer only the burden of producing evidence of the legitimacy of the practice—not the more demanding burden of persuasion typical of the earlier disparate impact cases.[99]

The Court now placed on the plaintiffs the burden of persuading the trier of fact that the employer could have adopted alternative practices that served a legitimate business purpose, but did not adversely affect racial minorities and women.[100] In prior decisions, the employer—not the plaintiff—seemed to have the burden of persuasion on the lack of alternative practices.[101]

As the discussion below will illustrate, the Court's new conservative majority in *Wards Cove* redefined disparate impact and analytically and substantively conflated it with disparate treatment. The substantive change is most visible in O'Connor's plurality opinion in *Watson* that explicitly incorporated the intent requirement into the disparate impact theory. The analytic changes described above had the practical effect of grafting onto disparate impact the disparate treatment framework for establishing Title VII liability. Through these changes, the Court effectively dismantled the *Griggs* disparate impact theory and endorsed a conception of equality that embraces only a single theory: equal treatment as reflected in the Title VII disparate treatment theory.

1. The substantive strand: only intentional discrimination is prohibited under Title VII. It is well settled that Title VII disparate treatment theory prohibits only intentional discrimination,[102] as do employment discrimination claims brought under the equal protection clause and the Civil Rights Act of 1866, 42 U.S.C. § 1981.[103] For example, Justice O'Connor in a separate concurrence in *Price*

97. *Id.* at 2126 (citing Dothard v. Rawlinson, 433 U.S. 321, 329 (1977)).

98. *Id.* at 2127 (citing Watson, 108 S. Ct. at 2790 (plurality opinion)).

99. *Id.* at 2126 ("We acknowledge that some of our earlier decisions could be read as suggesting otherwise.")(citation omitted).

100. *Id.* at 2126-2127.

101. *Id.* at 2126.

102. *See, e.g.*, Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Int'l. Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15.

103. Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989); General Bldg. Contractors Assoc. v. Pa., 458 U.S. 375, 391 (1982)(Section 1981, like the equal protection clause, can be violated only by purposeful discrimination); Washington v. Davis, 426 U.S. 229 (1976)(equal protection clause).

Waterhouse v. Hopkins[104] clearly took the position that the theory of discrimination in Title VII disparate treatment claims is substantively the same as claims based on the equal protection clause of the Constitution.[105] In *Watson*, she went one step further and concluded that intentional or purposeful discrimination is likewise required in Title VII disparate impact claims. It is important to understand this conclusion because it is at the heart of the analytic revisions in the *Watson* plurality's opinion that the *Wards Cove* majority explicitly adopted.

Although *Watson* ostensibly focused on the need for a "fresh and somewhat closer examination" of the evidentiary guidelines to be applied in the subjective disparate impact claims,[106] Justice O'Connor ultimately concluded that the *Watson* evidentiary and burden-shifting rules were designed to determine whether, in a disparate impact claim, the "challenged practice has operated as the *functional equivalent of a pretext for discriminatory treatment.*"[107] Here, the description of the disparate impact theory as the functional equivalent of "pretext" is highly significant, for "pretext," in Title VII jurisprudence, is simply another label for intentional discrimination.[108]

It seems clear that Justice O'Connor intended to equate disparate impact with disparate treatment. In fact, in *Watson* she clearly spelled out her view that *Griggs* required a showing of intentional discrimination. Most significantly, she argued that "[t]he distinguishing features of the factual issues that typically dominate in disparate impact cases do not imply that the ultimate legal issue is different than in cases where disparate treatment analysis is used."[109] Second, she argued that "the necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination."[110] Third, she found it significant that in *Griggs* itself, "the employer had a history of overt discrimination that predated the enactment" of Title VII.[111] Finally, she concluded that in both the objective and subjective disparate impact claims, "a facially neutral practice, adopted without

104. Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1799-1800 (1989).
105. *Id.* at 1799 (O'Connor, J., concurring).
106. Watson v. Fort Worth Bank & Trust, 108 S. Ct. 2777, 2788 (1988).
107. *Id.* at 2790 (emphasis added).
108. *See* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981)(clarifying analysis for disparate treatment cases).
109. Watson, 108 S. Ct. at 2785 (plurality opinion).
110. *Id.*
111. *Id.*

discriminatory intent, may have effects that are indistinguishable from intentionally discriminatory practices."[112] Justice O'Connor was primarily concerned about establishing evidentiary and burden-shifting rules that do not compel employers to adopt preferential treatment practices that specifically take race and sex into account. This concern also guided the majority in *Wards Cove* and underscored its commitment to disparate treatment alone.[113]

2. The analytic strand: the same analytic framework applies to disparate impact and disparate treatment claims. The decision of the Court in *Wards Cove* to apply the practically equivalent analytic scheme to disparate impact that the Court has applied to disparate treatment claims completed the process of dismantling the disparate impact theory of *Griggs*—and moved the Court toward a single theory of equality under Title VII. Prior to *Watson* and *Wards Cove*, the Court had made clear that separate schemes of presumptions of proof and burden-shifting doctrines applied to disparate impact and disparate treatment claims. The analytic scheme for disparate treatment claims first required a plaintiff to establish a prima facie case.[114] The burden then shifted to the defendant to articulate a legitimate nondiscriminatory reason to rebut the presumption of intentional discrimination. The burden imposed upon the defendant, under the legitimate nondiscriminatory reason defense, was the burden of production of evidence, rather than the more rigorous burden of persuasion. If defendant carried its burden, then the ultimate burden shifted back to the plaintiff to convince the trial court by a preponderance of the evidence that she was a victim of intentional discrimination.[115]

Wards Cove changed the disparate impact analytic scheme to approximate that of disparate treatment. After *Wards Cove*, plaintiffs

112. *Id.* at 2786.

113. It has been clear, at least since *Weber*, that Chief Justice Rehnquist viewed Title VII as embracing only the equal treatment theory of equality.

114. As a general rule, plaintiffs can establish a prima facie case by showing membership in a protected class, application and qualification for a vacancy which the employer was seeking to fill, rejection, and the employer continuing to seek persons with the plaintiff's qualifications. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). *McDonnell Douglas* was a failure to hire case, but the courts have appropriately adjusted the basic approach for cases involving, for example, failure to promote or discharge. *See, e.g.*, Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981)(failure to promote); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976)(discharge).

115. Texas Dep't. of Community Affairs v. Burdine, 450 U.S. 248 (1981). *Burdine* resolved a conflict in the lower courts on the issue whether the burden of production of evidence or burden of persuasion is imposed on employers on the legitimate nondiscriminatory reason defense.

still have the initial burden to establish a prima facie case of disparate impact. But *Wards Cove* reduced the defendant's burden of proof in defending against a disparate impact claim. First, the Court redefined the defendant's rebuttal obligation from the more rigorous business necessity defense to a less rigorous legitimate business justification defense. The courts must now review the legitimate business justification defense under a "reasoned review"[116] standard rather than the *Griggs* "business necessity" standard.[117] In addition, defendants need only satisfy the burden of production of evidence standard rather than, as before, the burden of persuasion standard. Therefore, the defendant's burden in a disparate impact case is now analogous to the burden on the defendant in a disparate treatment case to "articulate a legitimate nondiscriminatory reason". Finally, *Wards Cove*'s holding that plaintiffs have the burden of persuasion on alternative practices is comparable to the plaintiff's opportunity to prove pretext in a disparate treatment case. Coupled with the heightened burdens in establishing a prima facie case, *Wards Cove* makes clear that the ultimate burden always remains with the plaintiff in a disparate impact case as it does in a disparate treatment case.

In fact, the *Wards Cove* analytic scheme for establishing disparate impact might be more onerous on the plaintiff than the disparate treatment scheme is. The Court has recognized that the rules for establishing a prima facie case of disparate treatment are not onerous;[118] however, *Wards Cove* adopts very rigorous rules for using statistical evidence to establish a prima facie case of disparate impact discrimination. In addition, the Court now requires the plaintiffs to carry the burden on alternative practices. This high threshold is underscored by the Court's willingness to place a light burden on the defendant to justify its employment practices.[119]

V. The Future of Title VII After Wards Cove*: The Need for a Third Reconstruction*

By adopting only an intent-based theory of discrimination, *Wards Cove* effectively holds that the goal of Title VII is not to remedy the

116. Wards Cove, 109 S. Ct. at 2126 ("The touchstone . . . is a reasoned review of the employer's justification for his use of the challenged practice.").

117. *Griggs*, 401 U.S. at 431 ("The touchstone is business necessity. If an employment practice which operates to exclude [Blacks] cannot be shown to be related to job performance, the practice is prohibited.").

118. Texas Dep't. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

119. *Wards Cove*, 108 S. Ct. at 2127.

present and continuing effects of societal discrimination against racial minorities and women. Nonetheless, the effects of societal discrimination continue to manifest themselves both in the public and private employment sectors.[120] Therefore, the future of Title VII in eradicating workforce discrimination depends in substantial part on eliminating the *Wards Cove* decision from our employment discrimination law jurisprudence.

Any attempt to remedy the present and continuing effects of societal discrimination and to repudiate *Wards Cove* must be predicated upon an historical understanding of previous congressional efforts to remedy discrimination against racial minorities. This history, in turn, helps decode the implicit message of *Wards Cove* (and the other civil rights decisions of the Supreme Court during its 1988 Term[121]), and offers valuable insights to guide any political, legislative, social, or economic proposals regarding the future of Title VII jurisprudence.

---

120. Even the conservative majority of the Supreme Court recognizes the continuing effects of societal discrimination. *See, e.g.*, City of Richmond v. Croson, 109 S. Ct. 706, 721 (1989)("we [do not view] 'racial discrimination as largely a phenomenon of the past' or that 'government bodies need no longer preoccupy themselves with rectifying racial injustices' "); Wards Cove, 109 S. Ct. at 2120-21 n.4 ("[o]f course, it is unfortunately true that race discrimination exists in our country"); Pettigrew, *New Patterns of Racism: The Different Worlds of 1984 and 1964*, 37 RUTGERS L. REV. 673 (1985)(explaining that both individual and institutional racism remain a prominent part of American life); *See generally* Beller, *Changes in the Sex Composition of U.S. Occupations*, 1960-81, 20 J. HUM RESOURCES 235 (1985); *See also*, ONE NATION INDIVISIBLE: THE CIVIL RIGHTS CHALLENGE FOR THE 1990'S, REPORT OF THE CITIZENS' COMMISSION ON CIVIL RIGHTS (R. Govan & W. Taylor eds. 1989) [hereinafter ONE NATION]; Karst, *Woman's Constitution*, 1984 DUKE L.J. 447 (1984); Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983); Schnapper, *Perpetuation of Past Discrimination*, 96 HARV. L. REV. 828 (1983).

121. The other employment discrimination cases decided by the Court during its 1988 Term are: Martin v. Wilks, 109 S. Ct. 2180 (1989)(white males who claimed that they were victims of intentional discrimination because of race-specific remedial relief in a court-approved affirmative action plan are not barred from collaterally attacking the plan in a separate lawsuit, even though they had notice and an opportunity to be heard before the court approved the plan); Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989)(limiting the reach of 42 U.S.C. § 1981 to remedy employment discrimination by private employers by holding that the Civil Rights Act of 1866 extends only to the formation and enforcement of an employment contract but not to other claims of discrimination that may arise from the conditions of employment); Lorance v. AT&T Technologies, 109 S. Ct. 2261 (1989)(barring under the statute of limitations period a Title VII suit by female employees claiming sex discrimination on the basis of a seniority system that the employer and union had adopted to give male employees a competitive advantage over female employees); Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989)(adopting the same decision defense in the liability phase of a Title VII mixed motives case); Public Employees Ret. Sys. of Ohio v. Betts, 109 S. Ct. 2854 (1989)(rejecting an age discrimination challenge to an employee benefit plan); Jett v. Dallas Independent School Dist., 109 S. Ct. 2702 (1989)(employment discrimination claims

A. A Brief Historical Perspective

Throughout its history, the United States has adopted several policy positions on the legal status of Blacks in the public and private sectors.[122] The first policy, grounded in the institution of slavery, did not recognize Blacks as citizens.[123] A policy of full citizenship for Blacks embodied in the First Reconstruction ostensibly replaced this nonrecognition.[124] The First Reconstruction consisted of three constitutional amendments and five congressional statutes to foster black political, social, and economic equality.[125]

The adoption of the "separate but equal doctrine"[126] and the enactment of the black codes in the southern states repudiated the First Reconstruction.[127] The Supreme Court's restrictive interpretations of the post-Civil War legislation played a significant role in ending the First Reconstruction.[128] Most damaging was the Court's narrow construction of the "privileges and immunities" clause[129] and its view that "state action" must be proven as an element of a claim.[130] The "state action" requirement became,[131] and still remains, a major impediment to the efficacy of the remaining post-

---

brought under 42 U.S.C. § 1981 against municipalities are subject to the rule that requires a showing that the adverse employment decision was based upon an official policy).

City of Richmond v. J. A. Croson Co., 109 S. Ct. 706 (1989), involved an equal protection challenge to a race-specific affirmative action plan designed to provide employment opportunities to racial minorities and women in public construction contracts. The Court stated, "We confront once again the tension between the fourteenth amendment's guarantee of equal treatment to all citizens and the use of race-based measures to ameliorate the effects of past discrimination on the opportunities enjoyed by members of minority groups in our society." *Id.* at 712. The Court resolved the tension by holding that the concept of equality under the Constitution requires the application of a strict scrutiny test to this context and that societal discrimination, standing alone, will not justify the use of race-specific remedies.

122. Only recently have we taken steps to adopt laws to bring about meaningful equality for women. *See generally* Karst, *supra* note 121.

123. This policy was established in U.S. CONST. art. I, § 2 (apportioning representation in the House of Representative on the basis of state population, counting slaves as only three-fifths of a person).

124. *See* Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1323 (1952).

125. The basic building blocks for the First Reconstruction were the thirteenth, fourteenth and fifteenth amendments to the Constitution, and statutory provisions that Congress enacted pursuant to these amendments. *See, e.g.*, 42 U.S.C. §§ 1981, 1982, and 1983 (1982). *See* Gressman, *supra* note 124, at 1323.

126. Plessy v. Ferguson, 163 U.S. 537 (1896).

127. *See, e.g.*, C. WOODWARD, THE STRANGE CAREER OF JIM CROW (2d rev. ed. 1966).

128. *See* Gressman, *supra* note 124, at 1336-43.

129. *See* Slaughterhouse Cases, 83 U.S. (16 Wall) 36 (1873).

130. *See* Virginia v. Reeves, 100 U.S. 313 (1879).

131. *See* Gressman, *supra* note 124, at 1339-42.

Civil War civil rights legislation to remedy acts of private discrimination.[132]

The Supreme Court's rejection of the "separate but equal" doctrine in the 1954 decision of *Brown v. Board of Education*[133] helped usher in the Second Reconstruction.[134] The Second Reconstruction culminated in the enactment of Title VII as part of the omnibus Civil Rights Act of 1964,[135] the most comprehensive piece of legislation ever enacted by Congress to address societal racism and sexism. Title VII of the 1964 Civil Rights Act, and the favorable construction that the courts generally gave to it, encouraged the hope that the Second Reconstruction would eradicate both intentional discriminatory conduct and the effects of societal discrimination against racial minorities and women.[136]

B. The Implicit Message of the Supreme Court: An End to the Second Reconstruction

This historical perspective shows that the Court's 1988 Term civil rights decisions constitute the second time that the Court has played a pivotal role in halting promising developments in eliminating discrimination. In fact, the Court's 1988 Term, and the implicit message it conveys, suggests the end of the Second Reconstruction.[137] This message is that racial minorities and women should no longer benefit from the most promising development that the *Griggs*

---

132. *See, e.g.*, Lugar v. Edmonson Oil Co., 457 U.S. 922 (1982); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

133. 347 U.S. 483 (1954).

134. The term "Second Reconstruction" refers to the legal, political, social, and legislative developments that took place between the 1954 *Brown v. Board of Education* decision and the enactment of the federal civil rights legislation in the 1960's. These developments included the Court's rejection of the "separate but equal" doctrine in *Brown*, the civil rights demonstrations in the 1960's, *see* REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968), the nonviolent activities of Dr. Martin Luther King, *see* D. GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE (1986), and the efforts of the civil rights coalitions in pushing for civil rights legislation. *See also* M. MARABLE, RACE REFORM AND REBELLION: THE SECOND RECONSTRUCTION IN BLACK AMERICA, 1945-82 at 66, 168-99 (1982); Woodward, *From the First Reconstruction to the Second*, HARPER'S MAG., April 1965 at 127.

135. 42 U.S.C. §§ 2000a to 2000h-6 (1982 and Supp. 1987). The legislative history of the 1964 Civil Rights Act is chronicled in C. WHALEN & B. WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHT ACT (1985).

136. *See* Belton, *supra* note 5; Norton, *Equal Employment Law: Crisis in Interpretation—Survival Against the Odds*, 62 TUL. L. REV. 681 (1988).

137. *See, e.g.*, Brodin, *Reflections on the Supreme Court's 1988 Term: The Employment Discrimination Decisions and the Abandonment of the Second Reconstruction*, 31 B.C.L. REV. 1 (1989).

disparate impact theory provided—the legitimation of race- and sex-specific affirmative action remedies.

The implicit message in *Wards Cove* parallels the explicit message of the justices who dismantled the civil rights legislation of the First Reconstruction. A comparison of the Court's 1988 Civil Rights decisions to the 1883 *Civil Rights Cases*[138] illuminates this historical parallel. At issue in the *Civil Rights Cases* was the scope of the Civil Rights Act of 1875.[139] The Civil Rights Act of 1875, described by one historian as the "capstone of the congressional civil rights program"[140] of the First Reconstruction, sought to guarantee equality for all citizens. Section 1 required that all persons be granted the same accommodations and privileges to full enjoyment of inns, public conveyances, and theaters.[141]

The Supreme Court held in the *Civil Rights Cases* that the 1875 Act did not apply to the conduct of private citizens who deny blacks access to public accommodations. The Court explained:

> When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.[142]

The *Wards Cove* conservative majority extended this reasoning of the *Civil Rights Cases*, viewing disparate impact and its legitimation of "preferential treatment"[143] and "quotas"[144] as an undesirable rule of law that treats racial minorities and women as "special favorite[s] of the law".[145] It suggested that such favoritism is no longer appropriate or necessary and thus eliminated it by dismantling *Griggs*. The majority believed that the disparate treatment theory must be the "ordinary mode" or substantive standard by which all Title VII claims of discrimination—whether brought by racial minorities or

138. 109 U.S. 3 (1883).

139. Ch. 114, 18 Stat. 335.

140. Gressman, *supra* note 124, at 1334.

141. *See id.* at 1335. The provision parallels, in some respects, the public accommodations provisions of Title II of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a. Like the 1964 Civil Rights Act, much of the post-Civil War statutory civil rights legislation was designed to reach and remedy discrimination in the private sector.

142. 109 U.S. at 25.

143. Watson v. Fort Worth Bank & Trust, 108 S. Ct. 2777, 2788 (1988) (plurality opinion).

144. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2122 (1989).

145. The Civil Rights Cases, 109 U.S. at 25.

majorities, men or women are evaluated.[146] Justice Blackmun, in his *Wards Cove* dissent, described the underlying premise of this position: "One wonders whether the majority still believes that race discrimination—or, more accurately, race discrimination against nonwhites—is a problem in our society, or even remembers that it ever was."[147]

C. *The Need For a Third Reconstruction*

The *Griggs* disparate impact theory was the most important doctrinal development in employment discrimination law.[148] Studies on affirmative action have documented its effectiveness in improving the economic status of racial minorities and women.[149] At the same time, the business community has accepted affirmative action plans as good business practice.[150]

Wards Cove will adversely affect the enforcement of Title VII in a number of ways.[151] It will make it more difficult for plaintiffs to prevail in Title VII litigation because intentional discrimination is more

146. *See also* City of Richmond v. J. A. Croson, 109 S. Ct. at 721 (" '[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.' ")(quoting University of California Regents v. Bakke, 438 U.S. 265, 289-290 (1978)(Powell, J.)(plurality opinion)).

147. 109 S. Ct. at 2136 (Blackmun, J., dissenting).

148. The *Griggs* disparate impact theory has substantially influenced the development of other areas of the law. *See, e.g.*, R. SCHWEMM, HOUSING DISCRIMINATION LAW 59 (1983); *Disparate Impact Analysis and the Age Discrimination in Employment Act*, 68 MINN. L. REV. 1038 (1984); Wegner, *The Antidiscrimination Model Reconsidered: Ensuring Equal Opportunity Without Respect to Handicap under Section 504 of the Rehabilitation Act of 1973*, 69 CORNELL L. REV. 401 (1984).

149. *See, e.g.*, H. HAMMERMAN, A DECADE OF OPPORTUNITY: AFFIRMATIVE ACTION IN THE 1970s (The Potomac Institute 1984); Leonard, *The Impact of Affirmative Action on Employment*, 2 J. LAB. ECON. 439 (1984).

150. *See* Note, *supra* note 45. *See also* Jones, *The Genesis and Present Status of Affirmative Action in Employment: Economic, Legal and Political Realities*, 70 IOWA L. REV. 901 (1985).

151. *See* Murphy, *Supreme Court Review*, 5 LAB. L. 679, 680 (1989)(the 1988 civil rights decisions of the Supreme Court were "almost total defeat for minority employees, and almost total victory for employers").

difficult to prove.[152] In addition, employers are also unlikely to undertake voluntary affirmative action plans because they are not assured of the net beneath the tightrope provided by *Weber*[153] and *Johnson v. Transportation Agency, Santa Clara County*.[154] Furthermore, the Equal Employment Opportunity Commission (EEOC) and other federal agencies with enforcement authority may have to revise their enforcement guidelines for the administration of employment discrimination claims.[155]

Wards Cove also will reinstitute the case-by-case, individual-by-individual approach to eliminating discrimination that characterized the pre-Title VII period, when the states' fair employment commissions played a major role in employment discrimination suits.[156] Historically, however, state fair employment commissions have been largely ineffective because they pursued a rather myopic theory of discrimination, identifying it as a moral problem not a legal wrong.[157]

---

152. *See, e.g.*, [Study by Yale law students showing impact of Wards Cove on pending cases—referred to in Vol. 4, Labor Relations Week, p. 205, cited by William Coleman in Senate Hearing on omnibus 1990 civil rights bill]; *An Analysis by the NAACP Legal Defense Fund On the Impact of the Supreme Court's Decision in Patterson v. McLean Credit Union, reprinted in*, PROMOTING MINORITIES & WOMEN: A PRACTICAL GUIDE TO AFFIRMATIVE ACTION FOR THE 1990's (a BNA Special Report) (1990); Brodin, *The Role of Fault and Motive in Defining Discrimination: The Seniority Question Under Title VII*, 62 N.C.L. REV. 943 (1984); Welch, *Removing Discriminatory Barriers: Basing Disparate Treatment Analysis on Motive Rather Than Intent*, 60 SO. CAL. L. REV. 733 (1987). *See also* Burstein & Monaghan, *Equal Employment and the Mobilization of Law*, 20 L. & SOC. REVIEW 355 (1986)(study showing that plaintiffs, at the appellate level, prevail in about half of the Title VII cases; study, however, includes both disparate treatment and disparate impact cases).

153. *See supra* notes 50-58 and accompanying text.

154. 480 U.S. 616 (1987). *Johnson* applied the rule in *Weber* to a Title VII challenge to an affirmative action plan voluntarily adopted by a public employer. *Weber* and *Johnson* have not been overruled, but the doctrinal underpinnings for those decisions are now questionable in light of *Wards Cove*.

155. Even before *Wards Cove*, the EEOC strongly advocated an approach to the enforcement of Title VII that was premised on the equal treatment theory of equality. Thomas, *supra* note 6 (author was the EEOC's chairman at the time article was written). For a study of the potential effect of *Richmond v. J. A. Croson*, 109 S. Ct. 706 (1989), on affirmative action plans of many government employers, *see* NAY & JONES, EQUAL EMPLOYMENT AND AFFIRMATIVE ACTION IN LOCAL GOVERNMENTS: A PROFILE, WORKING PAPERS SERIES 4, Institute For Legal Studies (1989).

156. M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 20-60 (1966). *See generally* L. KESSELMAN, THE SOCIAL POLITICS OF FEPC: A STUDY IN REFORM PRESSURE MOVEMENTS (1948)(public policy study of the early reform movement to deal with employment discrimination).

157. *See* Belton, *A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964*, 31 VAND. L. REV. 905, 912-14 (1978); Hill, *Twenty Years of State Fair Employment Practices Commissions: A Critical Analysis with Recommendations*, 14 BUFFALO L. REV. 22 (1964).

A Third Reconstruction is now necessary to undo the devastating effects of *Wards Cove*. This will require, among other efforts, legislative initiatives to overturn *Wards Cove*, a rethinking of the equality principle by acknowledging differences in redefining the equity norm, and a reconsideration of the role of the state courts in civil rights enforcement efforts in the 1990s. These three ideas will be briefly explored below.[158]

1. The legislative initiative. The Third Reconstruction necessarily must involve efforts to convince Congress both to overturn *Wards Cove* and to convey to the Court, through legislation, that the *Griggs* disparate impact theory is consistent with the goal of Title VII. In fact, Congress must affirmatively reject the message of all the Court's 1988 civil rights decisions.

Congress's intentions regarding Title VII's goals remain hotly contested.[159] Those who argue that Congress intended to adopt the equal treatment theory focus on statements scattered throughout the legislative history of the 1964 Civil Rights Act.[160] Those who believe that Congress also included equal achievement as a goal point both to the context in which Title VII was enacted and to Congress's deliberations leading to the 1972 amendments to Title

158. Other suggestions on the future of Title VII include the recommendation that the President direct federal agencies to make changes in their administrative enforcement procedures only after notice and opportunity to be heard by the public; that the government encourage cooperative validation of testing by police officers; and that federal agencies apply disparate impact analysis to cases involving disparate treatment discrimination. Rose, *Testing and Discrimination*, in ONE NATION, *supra* note 120, at 168-171 (1989). *See also* Withers & Winston, *Equal Employment Opportunity*, *id.* at 190-214 (urges forceful declaration by the President enforcing antidiscrimination law, a federal policy on full employment; federal government to become a model employer; sufficient funding for vigorous enforcement of antidiscrimination laws by federal agencies). Professor Clark has suggested that civil rights advocates should focus on remedies for plaintiffs including legislation for "innocent victims" who are displaced by affirmative action plans; legislation to give the EEOC cease and desist authority; liberalizing fees awarded to successful Title VII plaintiffs; and the revival of direct social action, in the form of economic boycotts. Clark, *The Future Civil Rights Agenda: Speculation on Litigation, Legislation, and Organization*, 38 CATH. U. L. REV. 795, 807-826 (1989).

159. *Compare, e.g.*, Blumrosen, *supra* note 10, at 14-16 (1987)(the legislative history is inconclusive) *with e.g.*, Gold, *supra* note 28 (the impact theory is not supported by legislative history, is unworkable because of employers' ability to formulate alternative selection procedures, and should be abandoned because it encourages employers to use quotas).

160. For example, Senator Humphrey, a supporter of Title VII, defined "discriminate" as a "distinction in treatment given to different individuals because of their race, religion or national origin." 110 Cong. Rec. 5864 (1964)(statement of Sen. Humphrey). An Interpretive Memorandum of Title VII, provided to the Senate by Senators Clark and Case, stated that "[t]o discriminate is to make a distinction, to make a difference in treatment or favor . . . ." 110 Cong. Rec. 7213 (1964). Senator Muskie, also a supporter of Title VII, stated that "[The Act] seeks to do nothing more than to lift the Negro from the status of equality to one of equality of treatment." 110 Cong. Rec. 14,328 (1964).

VII.[161] At the time that Congress debated the 1972 amendments,[162] the Supreme Court decided *Griggs*; both legislative houses were aware of this and directly addressed the disparate impact theory. The House also favorably referred to the decision.

The deliberations over the 1972 amendments supported the proposition that, even if Congress had intended to adopt the equal treatment theory of equality in 1964, it had a broader sense of discrimination in 1972. Congress seemed to understand that an individualized disparate treatment model was myopic given the pervasive effects of discrimination against racial minorities and women, as manifested in "institutional practices" and the continuing "effect" of societal discrimination.[163] The legislative history of the 1972 amendments seems to further support including the *Griggs* position into a construction of Title VII when it states:

> In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the *present case law* as developed by the courts would continue to govern the applicable construction of Title VII.[164]

---

161. Blumrosen, *supra* note 10, at 14-16 (1987); Helfand & Pemberton, *The Continuing Vitality of the Title VII Disparate Impact Analysis*, 36 MERCER L. REV. 939, 948-54 (1985).

162. Pub. L. 92-261, 86 Stat. 103 (1972).

163. H. R. Rep. No. 238, 92d Cong., 1st Sess, at 8 (1971), *reprinted in* 1972 U.S. Code Cong. & Admin. News, at 2143-44 (footnotes omitted), makes specific reference to *Griggs*:

> During the preparation and presentation of Title VII of the Civil Rights Act of 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, due, for the most part, to ill-will on the part of some identifiable individual or organization . . . . Employment discrimination, as we know it today, is a far more complex and pervasive phenomena. Experts familiar with the subject generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs. The literature on the subject is replete with discussions of the mechanics of seniority and lines of progression, perpetuation of the present effects of earlier discriminatory practices through various institutional devices, and testing and validation requirements. The forms and incidents of discrimination which the [EEOC] is required to treat are increasingly complex. Particularly to the untrained observer, their discriminatory nature may not appear obvious at first glance. A recent striking example was provided by the [Court] in *Griggs v. Duke Power Co.* . . . where the Court held that the use of employment tests as determinative of an applicant's job qualification, even when nondiscriminatory and applied in good faith by the employer, . . . was a violation of Title VII if such tests work a discriminatory effect in hiring patterns and there is not showing of an overriding business necessity for the use of such criteria.

See also S. Rep. No. 415, 92d Cong., 1st Sess. 5 (1971).

164. Section-By-Section Analysis of H.R. 1746, accompanying The Equal Employment Act of 1972—Conference Report, 118 Cong. Rec. 7166 (1972), *reprinted in* EEOC, Legislative History of the Equal Employment Opportunity Act of 1972, at 1844 (1972)(emphasis added).

In the past, the Supreme Court has agreed that through the legislative history of the 1972 amendments to Title VII, Congress endorsed the *Griggs* disparate impact theory.[165] In 1989, however, a majority of the current Court seemingly sided with other commentators who argue that the reference to *Griggs* in the 1972 legislative history is not dispositive on the issue of whether Congress endorsed the disparate impact theory.[166]

To effectuate the Third Reconstruction, Congress must speak directly to the viability of the disparate impact theory. In the past, Congress has repudiated Supreme Court employment decisions that it concluded were inconsistent with the goals of Title VII. For example, Congress enacted the Pregnancy Disability Amendment of 1978[167] to overturn the Court's decision that discrimination on the basis of pregnancy is not sex discrimination.[168] In Section 274 of the Immigration Reform and Control Act of 1986,[169] Congress overturned the restrictive construction that the Court gave to the term "national origin" in Title VII.[170]

In the same vein, both the Senate and the House of Representatives have introduced legislation to overturn *Wards Cove*.[171] To increase the likelihood that these bills pass, political activity by racial minorities and women, and coalition building will be critical, much as they were in the early 1960's in helping to enact the Civil Rights Act of 1964.[172]

---

165. *See* Connecticut v. Teal, 457 U.S. 440, 447 n.8 (1982)(citing S. Rep. No. 415, 92d Cong., at 5 (1971); H.R. Rep. No. 238, 92d Cong., at 8 (1971)). *See also* Franks v. Bowman Transportation Co., 424 U.S. 747, 764-65 n.21 (1976); Motorola v. McLain, 484 F.2d 1339, 1344 (1973)(the legislative history of the 1972 amendments to Title VII removed any doubts that Title VII was to be construed broadly).

166. *See* Gold, *supra* note 28.

167. 42 U.S.C. § 2000(e), Subsec K. (1988).

168. General Elec. Co. v. Gilbert, 429 U.S. 125 (1976)(holding that a comprehensive health plan excluding pregnancy from coverage is not sex discrimination under Title VII because it makes a distinction between pregnant and nonpregnant persons).

169. Pub. L. No. 99-603, § 274B (1986).

170. Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973). *See* Note, *Standards of Proof in Section 274B of the Immigration Reform and Control Act of 1986*, 41 VAND. L. REV. 1323 (1988)(discussing the debate between President Reagan and Congressman Frank on whether Congress intended to adopt the disparate impact standard in the enforcement of Section 274B).

171. *See* H.R. 400 and S. 2104, 101st Cong., 2d Sess. (1990). These legislative efforts would overturn the analytic underpinnings of *Ward Cove*, and redress other civil rights decisions handed down by the Court during its 1988 Term. Neither of these proposed bills would, however, address the heightened statistical standards adopted in *Wards Cove*. *See*, Ralston, *Court vs. Congress: Judicial Interpretation of The Civil Rights Acts and Congressional Response*, 8 YALE L. & POL'Y REV. 205 (1990).

172. *See* Belton, *A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964*, 31 VAND. L. REV. 907, 917 (1978).

2. Reconceptualizing the "equality" concept. A fundamental concept of the equal treatment theory is the notion of "likeness or similarly situated." The theory holds that "similarly situated" individuals, without regard to race or sex, should be treated the same by some unstated normative standard. In fact, the unstated normative standard by which the Court determines "likeness" has predominantly been based on a white male norm.[173] Whether the norm by which the Court determines "similarly situated" should be reconsidered is only now beginning to command attention in Title VII case law and scholarship.[174] Professor Derrick A. Bell has also questioned the "equality" concept's potential to bring about equality for racial minorities.[175]

The issue of the appropriate norm for testing the validity of "likeness," or "similarly situated" was addressed by the Court in a Title VII pregnancy case, *California Federal Saving and Loan Assoc. v. Guerra.*[176] The majority in *Guerra* was willing to redefine the norm—based on the family obligations of women as well as men—in upholding a state law granting preferential treatment to women affected by pregnancy, childbirth, and related medical conditions.[177] The courts have also recognized that the intersection of race and sex discrimination provides a basis for relief, under Title VII, for a sub-class of black females, even in the absence of discrimination against black men or white women.[178]

The question of whether a policy of equal treatment ought to be the sole goal of our national policy against discrimination is one that merits more serious debate. One projection is that almost two-thirds of the entrants into the workforce between now and the year 2000 will be women—42% native white women, 13% native non-white women, and 9% immigrants. White males will constitute only

173. The white male norm is implicit in *Griggs*: Title VII was designed to "remove barriers that . . . favor . . . white employees over other employees." 424 U.S. at 429-30. *See also* Bender, *Sex Discrimination or Gender Inequality*, 57 FORD. L. REV. 941 (1989).

174. *See, e.g.*, Minow, *Forward, Justice Engendered*, 101 HARV. L. REV. 10 (1986)(discussing how justice has been "engendered" by judicial commitment to giving equality meaning for people once thought to be different).

175. D. BELL, *supra* note 6.

176. 479 U.S. 272 (1987).

177. The law "allows women as well as men, to have families without losing their jobs." *Id.* at. 289. The dissent, without specifically stating its norm for equality—which was arguably based on the norm of maleness—would have struck down the law under the equal treatment theory of equality. *Id.* at 297-304 (White, J., dissenting).

178. *See, e.g.*, Hicks v. Gates Rubber Co., 833 F.2d 1406, 1416 (10th Cir. 1987) (following Jeffries); Jeffries v. Harris Co. Community Action Ass'n, 615 F.2d 1025, 1032 (5th Cir. 1980). *See also*, Note, *Conceptualizing Black Women's Employment Experience*, 98 YALE L.J. 1457, 1469-73 (1989).

15% of the entrants.[179] Based on these projections, we must begin to reconceptualize the concept of equality from the one adopted during an era of male breadwinners and female homemakers.[180] The *Wards Cove* standard of equality is inadequate, as a matter of policy, to facilitate institutional and structural changes to respond to the changing face of the workforce.

3. State laws prohibiting employment discrimination. Historically, civil rights advocates and litigants have preferred the federal courts over state courts in the judicial enforcement of civil rights claims, including claims brought under Title VII. That bias is not unfounded. In fact, the First Reconstruction was partially prompted by Congressional concern that state courts would not be sympathetic to the enforcement of federal rights.[181] A second reason for the bias in favor of federal courts was the perceived notion that the "quality of justice" in federal courts was substantially superior to the "quality of justice" in state courts.[182] A third reason was the concern among civil rights advocates that juries in state court proceedings would not be sympathetic to discrimination claims, particularly those of racial minorities.

Many state and local governments prohibit discrimination in employment on the basis of race, sex, religion and national origin.[183] Title VII specifically preserves state laws prohibiting discrimination in employment, except to the extent that state laws are inconsistent with the federal law.[184] Also, state courts are not bound by the theoretical, analytic and remedial schemes applied in the federal

179. *See* HUDSON INSTITUTE, OPPORTUNITY 2000: CREATIVE AFFIRMATIVE ACTION STRATEGIES FOR A CHANGING WORKFORCE (1988); *Firms address Workers' Cultural Variety*, Wall St. J., Feb. 10, 1989, at B1, col. 1. *See also* Norton, *The End of the Griggs Economy: Doctrinal Adjustment for the New American Workplace*, 8 YALE L. & POL'Y REV. 197 (1990) (arguing that scholars and legislators must also consider American's new service-based economy when recreating Title VII doctrine).

180. OPPORTUNITY 2000, *Id.*, at 7.

181. *See Developments and the Law-Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1135 (1977)(noting that after the Civil War, "[u]npopular or disadvantaged minorities, unable to protect themselves when isolated within the processes of state and localities, turned to the federal government and the federal courts with increasing frequency—and increasing success.").

182. *See* Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977)(criticizing the assumption that federal and state judiciaries are equally competent in enforcing federal constitutional rights).

183. *See* 3 Empl. Prac. Guide (CCH) ¶¶ 20,005-29,197 (collecting state and local statutes); BNA, STATE FAIR EMPLOYMENT LAWS AND THEIR ADMINISTRATION (1964). For a discussion of problems and issues in pursuing state law claims in federal court under the pendent jurisdiction doctrine, *see* Catania, *State Employment Discrimination Remedies and Pendent Jurisdiction Under Title VII: Access to Federal Courts*, 32 AM. U.L. REV. 777 (1983).

184. 42 U.S.C. § 2000e-7 (1982 & Supp. V. 1987). *See also* California Fed. Sav. and Loan Ass'n v. Guerra, 479 U.S. 272 (1987)(Title VII's pregnancy disability amendment

courts,[185] even though many state courts have endorsed the Title VII theoretical and analytic schemes developed by the federal courts.[186] Moreover, some states laws have statutory provisions prohibiting discrimination in employment under the disparate impact theory. In the past, some state courts have resisted efforts of the Court to curtail federal employment discrimination statutes.[187] In the future, they may be willing to continue to endorse the pre-*Wards Cove* jurisprudence on disparate impact.

VI. Conclusion

Title VII enforcement in the 1990s depends on reviving the *Griggs* disparate impact theory or creating an equality policy not grounded solely on an intent standard. It seems clear that the disparate treatment theory, standing alone, will not remedy the continuing effects of past societal discrimination against racial minorities and women. It appears that, at least for the foreseeable future, legislative resurrection of the *Griggs* disparate impact theory is the most promising first step in ushering in the Third Reconstruction.

---

does not preempt state pregnancy law requiring unpaid leave for pregnancy, childbirth or related medical conditions). Section 706(c) of Title VII, 42 U.S.C. § 2000e-5(c) (1982 & Supp. V 1987), provides that when an employment discrimination claim arises within a state having a state or local law prohibiting discrimination on the same grounds as Title VII, the plaintiff may not file a charge with the EEOC for at least sixty days after the commencement of state or local proceedings, or upon the termination of state or local proceedings, whichever first occurs. The Court considered the relationship between federal and state employment discrimination laws in Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982).

185. The sexual harassment cases are a good illustration of the difference between state and federal remedies. Sexual harassment claims can be brought in federal court under Title VII. *See* Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986). The remedies for successful sexual harassment claims under state laws, however, can be substantially broader than those remedies that are available under Title VII. For example although punitive damages are allowed in state sexual harassment cases, they are not recoverable in Title VII sexual harassment cases. *See, e.g.*, Fisher v. San Pedro Peninsula Hosp., 214 Cal. App. 3d 590 (1989)(punitive damages allowed); Montgomery, *Sexual Harassment in the Workplace: A Practitioner's Guide to Tort Actions*, 10 GOLDEN GATE U. L. REV. 879 (1980) (discussing common tort remedies); EEOC v. Detroit Edison Co., 515 F. 2d 301, 308-310 (6th Cir. 1975) (no punitive damages for sexual harassment under Title VII).

186. *See, e.g.*, Colorado Civil Rights Comm'n v. Travelers Ins. Co., 759 P. 2d 1358 (Colo. 1988); Saville v. Quaker Hill Place, 531 A. 2d 201 (Del. 1987); Georgia Bureau of Investigation v. Heard, 166 Ga. App. 895 (1983); Lynn Teachers Union, Local 1037 v. Mass. Comm'n Against Discrimination, 406 Mass. 515 (1990); Wisc. Tel. Co. v. ILHR Dept., 68 Wisc. 345 (1975). *See also* Friedman, *Fair Employment Legislation in Louisiana: A Critique of the 1983 Act and A Proposed Substitute Statute*, 58 TUL. L. REV. 444 (1983)(discussing problems with Louisiana fair employment law). The Court has held that state courts have concurrent jurisdiction in Title VII cases. *See* Yellow Freight Sys. v. Donnelly, 110 S. Ct. 1566 (1989).

187. *See* Arteton, *Employment Discrimination Claims in State Court: A Laboratory for Experimentation*, 23 N.Y.U. REV. L. & SOC. CHANGE 499 (1985); Saperstein, *Response, id.* at 509 (detailing experience in California state courts in employment cases, generally).